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Citizenship, Free Movement, and EU Enlargement

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Citizenship, Free Movement, and EU Enlargement

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Citizenship, Free Movement, and EU Enlargement^Ψ

*It is not the European Union that is joining the Czech Republic. In other words, we see it as a two way street.*¹

- External Relations Commissioner Hans van den Broek, 1996

*This would also be the best limit for our guardians to put on the size of the city. And they should mark off enough land for a city that size and let the rest go... As long as it is willing to remain one city, it may continue to grow, but it cannot grow beyond that point.*²

- Plato

Introduction

The European Union's most significant enlargement admitted ten states in 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. Freedom of movement among all but Malta and Cyprus had for many years been restricted. Laws and policies similar to the Soviet *propiska* (residence permits) system—which placed severe limits on the right to move even between different cities within the Soviet Union, let alone between different Republics—restricted mobility under Communism. For individual citizens in the postcommunist states that joined the Union in 2004, freedom of movement symbolized the “return to Europe” of EU accession. By contrast to the restricted movement that citizens of many of these states had experienced under Communism, EU citizenship promised a right to reside and work anywhere within the territory of the Union. The perceived injustice of the delay in granting free movement rights to Spanish and Portuguese citizens helps explain the support of Spanish and Portuguese political leaders for European citizenship. The transition period for free movement of workers upon the accession of Spain and Portugal was seven years, which was reduced to six years as fears of massive immigration from those countries proved unfounded. Once the language of European citizenship was being widely invoked, it became politically more difficult to distinguish free movement of persons from free movement of goods, services, and capital. Experience with the Spanish and Portuguese accessions in 1986—and German reunification—quashed the objection in the discussions leading to Maastricht that extending mobility rights to all categories of member state nationals would lead to chaos. Yet the enlargement negotiations with the central and eastern European states witnessed a renewal of similar objections.

^Ψ Prepared for conference on European Union Enlargement, Miami European Union Center, a partnership of Florida International University and the University of Miami, Friday April 22, 2005. This paper draws heavily from the author's book manuscript *Creating European Citizens*. Please email the author to check the proper citation willem.maas@nyu.edu

¹ *Voice of America*, 4 February 1996, <http://www.hri.org/news/usa/voa/1996/96-02-04.voa.html>.

² Plato (1992 [circa 380 BCE]: 423b)

There was a significant disjuncture between the existence of EU citizenship and the reality of the accession negotiations, in particular the transition arrangements passed to render enlargement more politically palatable in the existing member states. The negotiations disappointed those who hoped that European integration heralded a gradual move away from a focus on economic integration towards an increasing emphasis on individual rights. Because of largely unfounded fears of mass migration from accession countries to existing member states, full freedom of movement will be introduced only gradually. The addition of new member states with traditions of citizenship that differ from those of the existing member states alters the political dynamics affecting the future development of EU citizenship.

Consequences of Free Movement for Enlargement

All three Copenhagen criteria—the criteria formulated by the member states at the Copenhagen summit in June 1993 by which the membership applications of candidate states are judged—affect freedom of movement. The first criterion—that EU member states must have stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities—affects free movement most notably in the area of human rights and protection of minorities. The second criterion—the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU—means examining an accession state’s ability to deal with immigrant workers from other EU member states. The third criterion—the ability of a candidate state to take on the obligations of membership, most notably by transposing and applying the entire corpus of EU legislation known as the *acquis communautaire*—affects the entire legal framework, and thus the existing provisions for free movement.

As a consequence of their gradual development, European free movement rights categorize individuals by personal attributes and economic activity. Thus, for example, students, retirees, and professionals are covered by different pieces of legislation, which obfuscates the similarities in their rights. Even within the category of free movement of employed persons, an individual can be covered by one of five different regulatory frameworks. Self-employed workers exercise freedom of establishment when they move to another country to work; they are covered under cross-border provision of services when they continue to reside in their home country while providing services abroad. Employees are frontier workers if they work for a company that is not located in the same country as their residence; they are migrant workers if they move to another country to work for a foreign company; and they are posted workers if their home-country company sends them to work abroad. This separation of rights into different categories has struck some as odd and in need of change, particularly since the introduction of EU citizenship. Thus the 1998 High Level Panel argued that the “piecemeal development of EU rights on free movement of people [is] no longer consistent with the all-embracing status of European citizen created by the Treaty of Maastricht.”³

A significant difference between free movement and other issues is that the former is a central component of EU citizenship while the latter are not. EU citizenship confers the right of entry and residence to all citizens of member states. As an individual right, if EU citizenship is to be taken seriously, it must be respected by all member state governments. In theory, then, all

³ Veil and Commission of the European Communities (1998).

citizens of new member states should have gained residency rights throughout the EU and all citizens of existing member states should have gained the right to move into the territory of the new member states when these states acceded to the EU. But this was not the case. Official documents relating to European enlargement scrupulously avoided mention of EU citizenship. Instead, the accession and enlargement debates focused on the four freedoms: free movement of goods, capital, services, and persons.

Negotiations concerning free movement of goods proceeded very smoothly compared with the politically sensitive discussions regarding free movement of persons. In much the same way, free movement of goods had been guaranteed in the Treaty of Rome, while free movement of persons (rather than simply of workers) was fully achieved only after years of debate, with its recent implementation as a right of EU citizenship. The free movement of capital was more politically contested than free movement of goods, particularly on the question of the acquisition of secondary residences. Recognizing the “high political sensitivity” of this issue, the Commission proposed granting certain candidate countries a seven-year transitional period for the purchase by citizens of other EU member states of agricultural and forestry land, and a five-year transitional period for the purchase of secondary residences.⁴ Certain individuals, such as self-employed farmers who wished to establish themselves and reside in the future new member states, were not covered by the proposal. But rather than declaring that the right of establishment and the freedom to provide services are fundamental freedoms for EU citizens, the Commission simply asserted that the exemptions would protect “integrity of the single market.”⁵ Under the right of establishment, any self-employed individual, along with his or her family, can move anywhere in the Union to establish a business. Thus, for example, a Polish citizen can move to Berlin or London as an independent contractor. Unlike free movement of workers, the right of establishment and the freedom to provide services have always been effective immediately upon accession.

Of the four freedoms, the free movement of persons was the most hotly contested. This is evident from the timeline for the negotiations on the various chapters of the *acquis*: free movement of persons was left until the end. The negotiators relied on economic reasoning, and offered transitional arrangements to assuage those worried about workers from the candidate accession countries migrating to the existing EU member states. In April 2001, the Commission proposed phasing in full rights for the free movement of workers for all new member states other than Cyprus and Malta, acknowledging that the “aim of this proposal is to meet concerns where they arise and where they are justified, while allowing for mobility of workers,” and that instituting a transition period rather than immediately recognizing free movement rights would “ensure the widest possible public acceptance of enlargement.”⁶ During a general transition period of five years, member states would continue to operate their own national measures on accepting workers from the new member states. After no more than two years, the Commission

⁴The proposed transitional period on agricultural and forestry land applies to Hungary, the Czech Republic, Poland, Slovakia, and Bulgaria; for secondary residences to Hungary, the Czech Republic and Poland. Cyprus was granted a transitional period of 5 years for the acquisition of secondary residences, while Estonia, Slovenia, and Lithuania did not request transitional periods.

⁵ Commission of the European Communities (2001a).

⁶ Commission of the European Communities (2001c).

would conduct a review on the basis of which the Council, following consultation with the Parliament, could unanimously decide to shorten or lift the transition period. Another review could be requested by any member state, existing or new, with a view to further relaxation of controls. If any member state experienced serious disturbances in its labor market, it could maintain its national provisions for a further two years, meaning that full free movement rights for workers could take as long as seven years to take effect.

The perceived necessity of these transition periods was curious. Before the 2004 enlargement, approximately 300,000 nationals of candidate countries were legally employed in the EU. They accounted for just 0.2% of the total EU workforce, and roughly 6% of the 5.3 million EU workers who were not EU citizens. In Austria, which had the highest share of workers from candidate countries, they accounted for 1.2% of the workforce; in Germany, 0.4%. Seven out of every ten accession state workers lived in Germany and Austria, but even in these two countries they represented only about 10% of all workers from outside the Union. There were also an estimated 600,000 undocumented workers and migrants from the candidate countries living in the EU.⁷ Most studies predicted that few people would move from the new member states to the existing ones after enlargement, and the bilateral migration arrangements between candidate and existing member states were often not fully utilized: there were already more spaces for workers from candidate states to move to existing member states than there were workers willing to move.⁸ Yet, despite the existence of EU citizenship, domestic political concerns trumped European rights. In the months preceding accession in May 2004, every member state except Ireland and the UK had decided to restrict access to its labor market, while Ireland and the UK restricted access to social benefits for citizens from the new member states. Proponents of transitional arrangements—primarily the governments of Germany and Austria—pointed to precedent for support. The accessions of Greece in 1981 and of Spain and Portugal in 1986 had indeed featured transitional arrangements, but the 1995 accessions of Austria, Sweden, and Finland had not. Citizens of those states became EU citizens upon accession and immediately enjoyed the full range of rights of EU citizenship. In fact, they had previously enjoyed free movement rights under EEA agreements.

The focus on transitional arrangements was oddly incomplete: the transition covered only workers seeking employment with a company from an existing member state. Workers posted abroad by their companies, independent contractors seeking to relocate to the existing member states, and independent contractors wishing to provide services in the existing member states were not covered. Indeed, anyone not seeking employment from an existing member state company gained rights of residence immediately upon accession. This fit with precedent. Even in the accession of Spain and Portugal, the provision of services and the right of establishment of self-employed persons was not subject to transition periods.

Nevertheless, the European Parliament urged the introduction of transition periods in “regions where workers are likely to commute across borders,” in order to “secure an urgently needed socially sustainable integration process.”⁹ By contrast, Internal Market Commissioner

⁷ Commission of the European Communities (2001d: 29).

⁸ Commission of the European Communities (2001e) De la Porte (2001: 11).

Frits Bolkestein argued that “in a healthy economy it is better to prepare for competition than to erect new barriers. After all, the freedom of people to move is a central pillar of the single market.”¹⁰ Rather than justifying freedom of movement in terms of European citizenship, Bolkestein, like most opponents of transitional arrangements, reverted to an economic logic.

Domestic politics explains the opposition to granting full free movement rights immediately upon accession. In Austria, anti-immigration rhetoric had recently increased and was invoked by Euroskeptics and others to argue against EU enlargement. Fears of waves of economically disadvantaged easterners flooding over the borders once they were lowered—aqueous metaphors are common in immigration fears—were present in other member states as well. For example, the Dansk Folkeparti (Danish People’s Party), a populist party with an anti-immigration platform, regularly campaigns against free movement. It won twelve percent of the vote in 2001, becoming the third largest party in Denmark. Several years earlier, a poster for the “No” campaign against the Amsterdam Treaty warned about the coming enlargement: “Welcome to 40 million Poles in the EU.”¹¹ In Germany, some businesses and unions opposed admitting workers from candidate accession states because they feared competition from lower wage laborers. Yet it would seem more logical for German firms to demand transition periods for Polish firms (right of establishment) which might compete with them rather than workers (freedom of movement) that they could hire for lower wages than their current workforce.

The key exception to freedom of movement for individuals applied to people needing public assistance. The fact that social welfare arrangements differ in the candidate accession states as well as in the existing member states led some to revive the worry that freedom of movement between the existing member states and the accession states would lead to “social dumping,” whereby companies move to the countries with the lowest wages and least regulated labor standards. But an erosion of standards of welfare provision in the more established EU member states appears unlikely. Indeed the Europe Agreements signed with the candidate accession states appeared to lead to a race to the top rather than a race to the bottom in terms of the benefits provided under national social services regimes.¹²

Minority Rights

Migrations are problematic for prevailing theories of citizenship, which generally assume a fixed political community whose members reside within one state’s territory and possess ties of citizenship to one and only one sovereign. This “territorial assumption” leads many to regard migrations as one-time events in which immigrants move to a new country to remain there for the rest of their lives.¹³ The assumption that citizenship refers to a bounded, stable, and exclusive

⁹ European Parliament (2001b) at point 35.

¹⁰ Bolkestein (2000).

¹¹ Stephen Bates, “Sceptical Danes eye EU exit door. Immigration fears are dominating Denmark’s poll on Amsterdam,” *The Guardian*, 23 May 1998, p.20.

¹² De la Porte (2001: 10).

¹³ Elkins (1995).

form of political community continues to inform political philosophy, and thus issues of justice and community membership. In this context, the extent of assimilation or acculturation which can be requested or required of new citizens is a key concern.¹⁴ But the assumption of bounded political communities is empirically unsound, particularly in central and eastern Europe.

The existence of many overlapping ethnic groups defines central and eastern Europe. Anyone studying the region's history is struck immediately by the wealth of literature on minorities. There are countless detailed ethnographic studies of the history of various minorities, including studies of the situation of minorities under Communism.¹⁵ A glance at a historical atlas containing maps of ethnicity shows a patchwork quilt in central and eastern Europe. This pattern has been simplified somewhat, particularly following the Second World War, but important minority populations still exist both within and beyond the new member states.

One reason for the insistence that candidate states protect minority rights *before* accession was to diminish the chance of an exodus of minority populations. A pertinent example of what worried existing member states is attempts by Roma residing across the region to emigrate west. Following Czech commercial television station TV Nova's 1997 broadcast of a misleading documentary about how Roma could easily emigrate to Canada, there was a dramatic increase in the number of Roma launching immigration and refugee claims, and the Canadian government reintroduced a visa requirement for Czech citizens. Shortly thereafter, when a similar TV Nova documentary promoting the UK as an immigrant's paradise for Roma led to a spike in immigration claims, the UK imposed a visa requirement on Slovak citizens.¹⁶ Various EU member states subsequently reimposed or refused to lift visa requirements on citizens of the Czech Republic, Slovakia, Hungary, Romania, and Bulgaria. This affected not only immigration visas but also travel visas. The reimposition of visa requirements for citizens wishing to travel in the EU increased tension between the majority populations, who generally perceived Roma emigration as economically motivated, and the Roma, who pointed to discrimination as a key factor for their desire to emigrate.¹⁷ As the risk of high levels of Roma immigration seemed less likely, EU member states gradually lifted the visa requirements, but the emphasis on promoting minority rights in candidate states as a means to discourage emigration persisted throughout the accession negotiations.¹⁸

Most of the studies of freedom of movement focus on the potential for migration from the accession states to the existing EU member states, but freedom of movement is not necessarily a one-way flow from the new member states to the existing ones. Some member states were apprehensive about immigration from the existing member states. For example, Malta was

¹⁴ Habermas (1994).

¹⁵ See, for example, King (1973).

¹⁶ Čulík (1999)

¹⁷ Vašečka (2001: 21).

¹⁸ Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

concerned that large numbers of nationals of existing EU member states will move into its territory following enlargement. Given Malta's small population, the existing member states were not worried about immigration from Malta. But Malta pushed for and obtained a "safeguard mechanism to be adopted on the freedom of movement of workers taking into consideration the disruption of the labor market in Malta in the event of a high inflow of workers following accession."¹⁹ Similarly, it is conceivable that, for example, municipalities in the Czech Republic might worry about German citizens moving to border areas and gaining control of the municipal councils.²⁰ A final type of free movement is possible: movement between the new member states. Consider, for example, the potential impact of granting Slovak citizens the right to live and work in Hungary—and vice versa.

Consequences of Enlargement for Free Movement

How will enlargement affect the future development of freedom of movement and, more generally, of EU citizenship? On the one hand, enlargement might not change the nature of integration. New states periodically joining the Union complicate the ways in which decisions about how best to further integrate are made, but this does not change the speed or scope of integration. On the other, enlargement might require slowing down integration. This tension is captured in the famous exchange between former External Affairs Commissioner Hans van den Broek and former Czech Prime Minister Vaclav Klaus: Van den Broek responded to Klaus' adamant denial that enlargement would be difficult with the observation that "it is not the European Union that is joining the Czech Republic."²¹ His reply reflects the concern that a choice is necessary between deepening and widening. Either the EU proceeds with further integration (deepening) or it expands the number of member states (widening). The two cannot, in the logic of this formulation, coexist. The enlargement process will necessarily lead to a cessation, for some period of time, of further integration. In the area of freedom of movement and perhaps in the field of EU citizenship more generally, enlargement will likely complicate, but certainly not stop, the various integration processes underway.

The meaning and development of citizenship in central and eastern Europe raises special problems. With the exception of Malta, all of the new member states developed out of the decay and fall of three empires: the Russian empire, the Austro-Hungarian empire, and the Ottoman empire. Demographic movements and developments within these imperial realms were complex, and the relationship of the individual to political authority equally so. Recalling the distinction between state formation and empire building, some question the extent to which "western" notions of citizenship apply within the new member states.²²

Again with the exception of Malta, this time expanded to include Cyprus and Turkey, all of the accession countries were until 1989 part of the Soviet bloc. Communist rule has certainly affected central and eastern European law, but the effects on citizenship policy are unclear. It is

¹⁹ European Parliament (2001a) at point 19.

²⁰I thank Jean Laponce for a discussion on this matter.

²¹See footnote 1.

²²For one work distinguishing state formation and empire building, see Motyl (1999).

true that there is no single model of central and east European citizenship, just as there is no single model of west European citizenship. In terms of policy convergence, however, existing member states may have to start grappling with the legacies of Communist-inspired or pre-existing collectivist notions of the relationship of the individual to political authority. Some authors argue that the “Central-Eastern European countries have preserved (frozen, as it were, through the socialist period) a pre-World War Two version of the state and citizenship, in which the former is clearly the leading actor.”²³ Taking this seriously, the new accession states may have even more difficulty applying the *acquis communautaire* regarding individual rights than the existing member states.

Another key issue is border security. There is a perceived tension between the demands of upholding the safety and confidence of the existing EU citizens and the desire to maintain current levels of cross-border interactions in the regions that will come to constitute the new frontiers of the EU. As the Commission notes, on “the one hand, enlargement should not cause any new division of Europe, especially in regions where close links exist. On the other hand, the future external border of the Union must meet the security needs of today’s EU citizens.”²⁴ In other words, the eastern borders of the new member states will take on new significance upon accession.

States that currently participate in the Schengen system—removing internal border controls while coordinating external border controls—are likely to resist the admission of the new member states until these can demonstrate that they are able to fully apply Schengen standards.²⁵ In order to speed the process and ease the fears of existing Schengen members concerning the candidate accession states’ ability to control their borders, the Commission has spent considerable resources to support the central European candidate countries in adopting and implementing the body of EU law in the field of migration, visa and external border control management.²⁶ The Schengen system will eventually apply to all new member states, but full participation in it will be based on a two-step process. “The new Member States will first need to achieve a high level of external border control upon accession whereas the lifting of internal border controls with current Member States will take place only at a later stage, subject to a separate decision by the Council.”²⁷

Borders which were established and have been enforced since the decline of the three empires—those between the new member states—will once again fade in importance. After a century of very restrictive border controls, those areas of central and eastern Europe which have joined the Union will once again become a space in which migrations can occur with little hindrance from political authority. The demographic and political consequences of this development remain to be seen.

²³Castle-Kanerova and Jordan (2001: 132).

²⁴Commission of the European Communities (2001b).

²⁵Maas (2005)

²⁶Commission of the European Communities (2001c).

²⁷Commission of the European Communities (2001f: 5).

Enlargement and Citizenship

Historical parallels can illuminate the proper relationship between enlargement and citizenship. Take, for example, US President Thomas Jefferson's 1803 purchase of territory from the French government of Napoleon Bonaparte, doubling the size of the US. Although the Louisiana Purchase treaty stipulated that the inhabitants of the territories would "be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States," there was a lengthy debate in Congress about whether the treaty could grant US citizenship.²⁸ As one Senator noted, bestowing citizenship by treaty was unconstitutional: "We can hold territory; but to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we cannot constitutionally do."²⁹ In response, newly elected Senator John Quincy Adams proposed a constitutional amendment giving Congress the authority to incorporate new territories into the Union and bestow citizenship on the inhabitants of those territories.³⁰ His proposal was rejected, and there followed lengthy debates before the issue was finally settled. The question of whether the EU can simply bestow citizenship with the enlargement treaties was not raised, although the underlying dynamic is the same as it was with the Louisiana Purchase: the extension of the polity to new territory, and the granting of rights to the inhabitants of those territories.

The accession of new member states is not a one-time event but rather a gradual process, as the protracted negotiations on implementing the *acquis communautaire* indicate. Though it is difficult to conceive of citizenship in terms of a gradual process, the extension of EU citizenship rights to citizens of new member states *is* proceeding in stages, as this paper's discussion of the free movement of workers demonstrates. Yet citizenship is usually seen as a unitary status: either one is a citizen or one is not. That is not the way to think of citizenship in this case, because the current enlargement involves step-by-step extension of rights to individuals.

Most analyses of EU enlargement focus on economics. This paper's focus on citizenship opens up a wide range of social and political factors. Analyzing citizenship means going well beyond describing the "technical, depoliticized process of exporting the Union's *acquis communautaire*."³¹ Enlargement forces a new examination of the content and meaning of EU citizenship. The question of whether there are some core rights and some auxiliary ones is raised when the key right of EU citizenship—the right to move and take up residence—is denied to at least one important category of individuals: migrant workers from accession countries. EU citizenship is not a fixed category. Its meaning is contested by the various EU institutions, national governments, groups, and individuals, and this contestation is a key to understanding European integration. By highlighting the contestation, the enlargement process illuminates the nature of European integration. The challenge of enlargement of the Union from fifteen member states to twenty-five or more, coupled with the prohibition of discrimination on the grounds of

²⁸ Cleveland (2002: 171-81)

²⁹ Senator Uriah Tracy of Connecticut, cited in Cleveland (2002: note 1177)

³⁰ Cleveland (2002: note 1178)

³¹ Jileva (2002).

nationality, ensures that the “dynamic institution” of EU citizenship has not yet reached a stable equilibrium.

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